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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1940.

NO. 765

In the Matter of JOHN GALLIS, Bankrupt, and JAMES L. GALLIS, Bankrupt.

JOHN COTSIRILOS,
Petitioner,

v.

MAURICE KLEIN, Trustee,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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JOHN COTSIRILOS,

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v.

MAURICE KLEIN, Trustee,

Respondent.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your Petitioner, John Cotsirilos, respectfully represents and shows unto the Court as follows:

That on the 18th day of November, 1938, said John Gallis, and said James L. Gallis, filed their petitions in the United States District Court, Northern District of Illinois, Eastern Division, to be adjudicated bankrupts (Tr. 2-3).

That on the 19th day of April, 1939, the Respondent, Maurice Klein, as trustee in bankruptcy of the Estate of John Gallis, Bankrupt, and of the Estate of James L. Gallis, Bankrupt, filed with a Referee in Bankruptcy of the United States District Court, Northern District of Illinois, Eastern Division, a petition, in which your Petitioner, John Cotsirilos, was named Respondent; and in which said Petition, said Maurice Klein alleged: that said Bankrupts had transferred to your Petitioner the sum of $1,500.00 in the month of May, 1938 (which was more than four months prior to the time the Bankrupts' petitions were filed); and, that said Bankrupts, at said time were not indebted to Petitioner in any amount; and that said transfer was made without consideration, and for the sole purpose of placing the assets of said Bankrupts out of the reach of creditors; and was a fraud upon the creditors of said Bankrupts; and that Petitioner was not an adverse third party, "With any color or right in and to the funds that had been transferred to him" (Tr. 5-6).

To said petition, the Petitioner as the Respondent thereto, filed a verified answer, in which said answer, Petitioner alleged that said sum of money was given to Petitioner in payment of an indebtedness owed to Petitioner, by said Bankrupts, at said time; which said indebtedness arose from a loan made by Petitioner to said Bankrupts; and that said sum was transferred to Petitioner at said time in good faith and in payment of a just debt that was due (Tr. 7-8).

In said verified answer Petitioner alleged, that Petitioner "Appeared specially for the sole purpose of contesting the jurisdiction of the Court". (Tr. 7). No reply to said answer was filed.

That said matter was brought up for hearing by said Referee in Bankruptcy on November 6, 1939 (Tr. 17); that at said time Petitioner again objected to said Referee entertaining said petition, and adjudicating the asserted rights of the Respondent, Maurice Klein, against Petitioner, upon the ground: "That this proceeding is a summary action and seeks to deprive this Respondent of his interest and right adjudicated in the proper Court, and in the customary mode of Procedure" (Tr. 21); that said Referee thereupon overruled said objection and directed the Parties to proceed (Tr. 22).

That at the hearing before said Referee, five witnesses: John L. Gallis (Tr. 40-41), James L. Gallis (Tr. 60), John Cotsirilos (Tr. 100), Chris C. Harvalis (Tr. 116), and Eleftherios Cotsirilos (Tr. 133), testified in substance, that Petitioner had, prior to the month of May, 1938, loaned said Bankrupts the sum of $3,000.00; and that said sum of $1,500.00 had been transferred to Petitioner in the month of May, 1938, in repayment of the balance unpaid on said loan.

That said Referee thereafter entered an order in which said Referee found, that at the time said sum of $1,500.00 was transferred to Petitioner, said Bankrupts and another individual were doing business as a copartnership, and that at the said time, said Copartnership was insolvent and was not indebted to Petitioner, and that said money was transferred to Petitioner, "wholly without consideration and made for the purpose of concealing the assets of said co-partnership," and that said transfer was "An illegal diversion of assets," and that Petitioner was "Not an adverse third party herein with any color or right in and to said monies." And said Referee thereupon in said order directed that Petitioner "Turn

over and deliver" to the Respondent, Klein, "The sum of $1,000.00 now in his possession" (Tr. 12-13).

That thereafter, in due time, Petitioner filed in said District Court a petition for the review of said order, and among other grounds, urged that said Referee erred in overruling the objection, made by Petitioner, to said Referee entertaining jurisdiction (Tr. 151). Thereafter said District Court denied said Petition for Review and affirmed said order of the Referee (Tr. 154).

That thereafter, an appeal was taken by Petitioner to the United States Circuit Court of Appeals for the Seventh Circuit; and, in said Court of Appeals Petitioner assigned among other errors, the ruling of the District Court: that said Referee *had* jurisdiction (156-157). And, afterwards, on the 28th day of October, 1940, said United States Circuit Court of Appeals affirmed said order of the District Court (Tr. 171). Subsequently, on the 11th day of December, 1940, the Circuit Court of Appeals denied Petitioner's Petition for Rehearing (Tr. 172).

The opinion of the Circuit Court of Appeals is published in 115 Fed. (2d) 626.

The Court of Appeals stated in its opinion, inter alia, "The case is one which turns on credibility" (Tr. 170); that there was "Substantial evidence", to support the finding of the Referee, that Petitioner was "Not an adverse third party herein with any color or right in and to said monies" (Tr. 169); and, that if said finding of said Referee were accepted, "He was justified in concluding that appellant's (petitioner's) adverse claimant status was not real and substantial, but merely colorable. The Referee was therefore justified in acting in this summary pro-

ceeding. *May* v. *Henderson*, 268 U. S. 111; *Harrison* v. *Chamberlain*, 271 U. S. 191." (Tr. 170).

Jurisdiction.

The jurisdiction of this Court is invoked under Section 240A of the Judicial Code, as amended by the act of February 19, 1925.

The Questions Presented Are:

First: If the "general law", of a particular State is such that a claim by a trustee in bankruptcy, against a third party for a definite and stated sum of money, alleged to have been voluntarily transferred to such party by the bankrupt more than four months prior to the institution of the bankruptcy proceedings, for the purpose of defrauding creditors; is cognizable only in an action at law in which a trial by a jury is demandable, as of right; Is the right which such third party would have, if he were sued in a court of the particular State by a trustee in bankruptcy, upon such a claim, to demand that the matter be adjudicated in an action at law, a *substantive right;* and, one which a Federal Court in which the Bankruptcy proceeding is pending, is required to accord and grant such Party, if proceedings are instituted by the Trustee of the estate in such Federal Court, against such third Party to enforce such a claim?

Second: If the "general law", of a particular State is such, that a claim of a certain nature can be adjudicated only in an action at law, in which a jury trial is demandable as of right; and if there is a rule prescribed by the "general law", of the particular State, that a sufficient *quantum* of evidence exists, to require the submission of a cause to the jury, "When there is any evidence in the record, which standing alone, tends to prove the material

allegation" (of the complaint or answer, as the case may be, of the party holding the affirmative of the issue); and if a trustee in bankruptcy has instituted in a Federal Court located within such State, a proceeding against a third party to enforce a claim of the character in question, which claim does not arise under the Constitution or the Laws of the United States; and if evidence is introduced "which standing alone tends to prove the material allegations" (of the third party's answer); Is the right which such third party would have had, if he had been sued by the Trustee in a court of the State, upon such a claim, to have the question of his liability submitted to a jury in an action at law; *a substantive right,* which the Federal Court, in such a situation, must accord to such Third Party?

Third: Where a petition has been filed by a trustee in bankruptcy before a referee, and against a third party, for the enforcement of a claim which does not arise under the Constitution or the laws of the United States; and the nature of which is such, that under the "general law", of the State in which the Federal Court is located, the claim is adjudicable only in an action at law, in which a jury trial is demandable as of right; and, the Respondent has appeared and challenged the jurisdiction of the Referee, and has asserted that he was an adverse claimant; and evidence is introduced, which if true, would be sufficient to defeat the Trustee's claim; and, such evidence is also, under the "general law"; of the State in which the Bankruptcy Court is located, sufficient in weight to create an issue of fact, which must be submitted to the jury; Does the Referee acquire jurisdiction to find that the Respondent's claim is only colorable, and to adjudicate the matter in a summary way; by virtue of the fact that evidence is introduced which tends to establish the claim of the trustee?

The Reasons Why the Petitioner Contends that the Writ of Certiorari Should Issue Are:

First: That the Questions presented are involved in, and are constantly arising in, matters that are being adjudicated by the Federal Courts, sitting in bankruptcy throughout the Nation; and that said questions are being disposed of by the inferior Federal Courts, and the several Circuit Courts of Appeal, in a manner which indicates that a decided contrariety of opinion exists in the several Circuits.

Second: That it is highly important, that this Court declare whether or not a citizen, when placed in the circumstances that the record in this Cause discloses, Is entitled to a trial by a jury, for which provision is made by the Seventh Amendment to the Constitution of the United States.

Third: That the holding of the United States Circuit Court of Appeals in the instant case, that "The case is one that turns on credibility", (Tr. 170; 115 Fed. (2d) 627), is clearly in conflict with the decision of the United States Circuit Court of Appeals for the Second Circuit declared in the case of *B. & O. Highway Transp. Corporation* v. *Irving Trust Co.*, 62 Fed. (2d) 763; and is clearly in conflict with the decision of the Circuit Court of Appeals for the Second Circuit, rendered in the cause entitled *In re Yorkville Coal Co.*, and reported in 211 Fed. 619, as will be hereinafter more specifically pointed out.

Specifications of Errors Relied Upon:

First: That the United States Circuit Court of Appeals for the Seventh Circuit, erred in holding that the Petitioner was not entitled to have his rights adjudicated in an action at law.

Second: That the United States Circuit Court of Appeals for the Seventh Circuit, erred in holding that "The case is one that turns on credibility".

Third: That the United States Circuit Court of Appeals for the Seventh Circuit, erred in affirming the order of the District Court of the United States, Northern District of Illinois, from which the appeal was taken.

Fourth: That the United States Circuit Court of Appeals for the Seventh Circuit erred in not reversing the order of the United States District Court of the Northern District of Illinois from which the appeal was taken.

THE FEDERAL STATUTE, THE CONSTRUCTION OF WHICH IS INVOLVED IN THIS CASE, IS SEC. 721 OF THE REVISED STATUTES OF THE UNITED STATES (U. S. C. A. TIT. 28, SEC. 725), BY WHICH IT IS PROVIDED AS FOLLOWS:

> "The laws of the several States, except where the Constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply."

Wherefore, your Petitioner respectfully prays that a Writ of Certiorari be issued out of and under the seal of this Honorable Court, directed to the Circuit Court of Appeals for the Seventh Circuit; and commanding that Court to certify, and send to this Court for its review and determination, on a day certain to be named therein, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket: "In the Matter of John Gallis, Bankrupt, and James L. Gallis, Bankrupt, John Cotsirilos, Appellant, *vs.* Maurice Klein, Trustee, Appellee; case No. 7239." And that said

judgment of said Circuit Court of Appeals may be reversed by this Honorable Court, and that your Petitioner may have such other and further relief in the premises as this Honorable Court may deem meet and just; and your Petitioner will ever pray.

JOHN COTSIRILOS,
Petitioner,

By HAROLD O. MULKS,
Attorney for Petitioner.